

# South Brooklyn Legal Services' Child Care Network Support Project: How Legal Aid Programs Can Support Family Child Care

*By David Ehrenberg and Raun J. Rasmussen*

In this article we describe the work of South Brooklyn Legal Services' Child Care Network Support Project in providing educational, transactional, and other advocacy and legal services to child care networks and the home-based child care providers who are their members.<sup>1</sup> We write to encourage other legal aid offices to undertake this important work. Our two years of experience tells us that committing even modest resources to advocacy on behalf of child care providers can have significant results for the entire child care community.

Our office began its child care work several years ago with a National Association of Public Interest Law fellowship that focused on getting child care benefits for parents who were trying to meet welfare's work requirements or to make the transition off welfare. Obtaining subsidized child care benefits for parents and their children is the traditional focus of the few legal aid offices that do child care work in New York City.

After two years of this work we decided, for several reasons, to shift our efforts to the provider side. First, a client member of our program's board of directors asked us to help her incorporate her child care network. In meeting with her and some of the network's members, we realized that the issues facing this small,

newly formed organization and the providers whom it intended to serve were quite complicated. Child care providers needed help with liability insurance issues, tax obligations, threats of eviction from landlords who wanted them to stop providing child care in their apartments, and the license renewal process. And then there were payment problems. Providers often cared for children of parents who received child care subsidies for months without payment from the welfare department. Running a business under these circumstances was nearly impossible, and the networks lacked the legal expertise and advocacy resources to solve many of these problems.

Second, legal work on behalf of child care providers was a way to help clients make the transition from welfare to work by simultaneously helping increase the supply of child care services that new workers needed and create new job opportunities. Helping "microentrepreneurs" was community development work we were excited about doing. Our clients' determination to succeed, against daunting obstacles, inspired our work in support of their efforts.

## I. Family Day Care

Most states have three main categories of nonparent child care providers: child care

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centers; regulated home-based child care; and “kith and kin” (sometimes called “license-exempt”) child care providers, who are usually relatives or friends of the parents whose children need care. Regulated home-based child care providers (known as “family day care providers” in New York) are a critical part of this mix; they provide high-quality care for children and employment opportunities for those leaving welfare. Family day care providers can earn living wages and develop professional skills that lead to long-term employment opportunities in child care and other fields. As a recent study of child care in low-income communities concluded, “[b]y improving outcomes for at-risk children, supporting employment activities for their parents, and stimulating economic development in their communities, family child care has the potential to be a powerful tool for neighborhood growth and development.”<sup>2</sup>

New York State’s family day care regulations allow a person to become a licensed or registered home-based child care provider after completion of a training program and inspection of the home.<sup>3</sup> Family day care providers in New York may care for a maximum of eight children without another adult present. Group family day care providers with at least one assistant may care for up to fourteen children. State regulations require initial training, ongoing staff development, emergency exits and fire safety measures, and employee background checks; also, the provider must meet other health, safety, and early childhood education standards ensuring that the child care is both high in quality and safe for the children.<sup>4</sup> While the quality of care varies from provider to

provider, family day care is a highly regulated industry that should not be confused with baby-sitting. Family and group family day care providers care for roughly 31,000 children in New York City.<sup>5</sup>

Despite the huge demand for child care and the availability of family day care employment opportunities, the work is difficult to sustain. Family day care jobs are poorly paid and physically and mentally demanding. Child care workers have “the highest concentration of poverty-wage workers in any industry.”<sup>6</sup> To succeed in creating a business that provides a living wage, stable employment, and high-quality child care services, most family day care providers need substantial support in the form of business and legal training and access to advocacy and other backup services.

In New York City child care networks offer the best source of immediate, ongoing support for family day care providers. Networks are community-based organizations that supply technical assistance, training, supervision, lending libraries, and a variety of other services to family day care providers. Because professional isolation is a serious occupational hazard for family day care providers, child care networks and other community groups “link providers to each other and to resources and services to support, strengthen and professionalize their businesses.”<sup>7</sup>

## II. Family Child Care Networks

New York City has just over 100 family child care networks. City or state agencies fund some of these organizations through contracts to run programs such as the Child and Adult Care Food Program (a program similar to the free school lunch

<sup>2</sup> Amy Gillman, Surdna Found., Strengthening Family Child Care In Low-Income Communities 4 (2001).

<sup>3</sup> See generally N.Y. COMP. CODES R. & R. tit. 18, §§ 413 *et seq.* (2002). Many other states have licensing schemes for home-based child care providers. “Registration” applies to small family child care homes (up to eight children); “licensing” applies to large family child care homes (up to fourteen children).

<sup>4</sup> See generally *id.* §§ 413, 416–417.

<sup>5</sup> Telephone interview with staff at Child Care Inc., May 14, 2002.

<sup>6</sup> MARCY WHITEBOOK & DEBORAH PHILLIPS, FOUND. FOR CHILD DEV., CHILD CARE EMPLOYMENT: IMPLICATIONS FOR WOMEN’S SELF-SUFFICIENCY AND FOR CHILD DEVELOPMENT 3 (Working Paper Series 1999).

<sup>7</sup> Gillman, *supra* note 2, at 8.

program that covers preschool children) or to secure child care slots for low-income parents.<sup>8</sup> Many of the largest networks are part of a federally funded child care resource and referral agency. Such agencies are located in every state; they refer parents to child care providers and offer training and technical assistance to local providers.

New York City child care networks vary widely in their services and in their level of professionalism. Some are based in multiservice organizations located in midtown Manhattan and offer a wide variety of resources. Others are run from neighborhood storefront offices and have much more limited resources but greater day-to-day contact with their provider members and the community. Some offer services to more than 300 providers; others, fewer than 50. But no matter what type of organization they are, child care networks are providers' primary source of assistance.

Networks have introduced us to family day care providers and their problems. They have coordinated the scheduling and outreach for training sessions; distributed fact sheets and other information bulletins that we have prepared; acted as referral agents for their providers; and helped us remain informed about the most important issues facing their providers. Although our project was set up to support networks, we have accomplished this goal primarily by working with the networks to help solve problems for their providers.

Across the country, myriad local, state, and national groups provide varying kinds of assistance to child care providers and are thus potential partners for legal

aid offices interested in offering legal help to child care providers.<sup>9</sup> The Child Care Law Center in California is the foremost law office working nationally on both parent and provider side issues.<sup>10</sup> They have partnered with the Welfare Law Center and the NOW Legal Defense Fund to create a national child care collaborative.<sup>11</sup> The Children's Defense Fund in Washington, D.C., is an invaluable source of information on state and federal developments.<sup>12</sup> The National Association for the Education of Young Children, which has affiliates across the country, and the National Association of Family Child Care are extremely important.<sup>13</sup> Redleaf National Institute offers tax and legal information tailored for family child care providers and their advocates.<sup>14</sup> The National Association of Child Care Resource and Referral Agencies can refer interested parties to a resource and referral agency in a particular community.<sup>15</sup> These groups can inform interested parties about child care providers' problems and about local advocacy organizations; the information from these groups can help interested parties decide what role legal services can play to support these groups' efforts.

### III. Problems That Family Child Care Providers Encounter

Like other small businesses, getting paid for services that they provide is a major problem for family day care providers. They also encounter problems with licensing agencies, housing and land-use barriers, questions about liability and liability insurance, and tax difficulties.

#### A. Payment Problems

Many New York City child care pro-

<sup>8</sup> See generally 7 C.F.R. § 226 (Child and Adult Care Food Program), 45 C.F.R. § 98 (Child Care Development Block Grant).

<sup>9</sup> For an excellent introduction to legal services work in the child care area, see Stephanie Upp et al., *Child Care and Community Economic Development: Critical Roles for Legal Services*, 34 CLEARINGHOUSE REV. 3 (May–June 2000).

<sup>10</sup> See [www.childcarelaw.org](http://www.childcarelaw.org).

<sup>11</sup> These organizations maintain a listserve on child care issues; interested persons may join the listserve at <http://lincproject.duindns.org/mailman/listinfo/list>.

<sup>12</sup> See [www.childrensdefense.org](http://www.childrensdefense.org).

<sup>13</sup> See [www.naeyc.org](http://www.naeyc.org) and [www.nafcc.org](http://www.nafcc.org).

<sup>14</sup> See [www.redleafinstitute.org](http://www.redleafinstitute.org).

<sup>15</sup> See [www.naccrra.org](http://www.naccrra.org).

viders care for children whose parents are guaranteed child care assistance from the New York City Human Resources Administration.<sup>16</sup> Payments from this agency are notoriously hard to come by. Providers must fill out lengthy forms and make numerous trips to local welfare offices even though their time is spent caring for children; payments are routinely delayed for several months after a child first enters care. Once payment begins, rates are often improperly low and payments can stop altogether for many reasons, including a parent's move from one stage of the welfare-to-work continuum to the next, even if she continues to be eligible for the child care subsidy. Because family day care providers typically operate on a thin margin, payment problems and bureaucratic requirements can quickly sink a child care business.

We have worked closely with family day care providers and parents to help them jointly negotiate the confusing subsidy system. Although neither agencies nor advocates typically seek assistance from providers in resolving payment problems, the most professional providers are often the strongest advocates. When parents and providers work together, with assistance or training from advocates, payment problems can be resolved more quickly.

A recent analysis of the child care subsidy system concluded that the routine practices of child care funding agencies often cause severe payment problems that prevent parents from maintaining stable child care arrangements.<sup>17</sup> Our experience confirms this finding. Excessive paperwork and caseworker error can make it impossible for a parent or provider to get payments started even after a caseworker has authorized those payments. These chronic payment problems mean that children are often forced out of care due to nonpayment and experience the instability of moving from one provider to another, while providers never recover the lost income.



MARILYN NOLT

We have worked closely with family day care providers and parents to help them jointly negotiate the confusing subsidy system. Administrators of child care subsidies, parents, and advocates often view the child care providers who offer subsidized care as passive recipients of child care subsidies. But the most professional providers become actively involved as advocates for parents throughout the application and payment process and can be ideal partners for advocates who are attempting to eliminate barriers to obtaining child care subsidies.

During the past two years we have worked with approximately forty providers to obtain more than \$130,000 in retroactive child care payments. We have encountered a distressing number of computer errors, caseworker misinformation, and other easily remedied causes of payment problems.

Although we are glad to have obtained substantial back payments for a small number of providers, our primary goal has been to train parents, providers, and network staff to do this work on their own. Accordingly we have developed a

<sup>16</sup> N.Y. SOC. SERV. LAW §§ 332-a, 410-w (Consol. 2002); N.Y. COMP. CODES R. & R. tit. 18 § 415.5 (2002).

<sup>17</sup> GINA ADAMS ET AL., URBAN INST., NAVIGATING THE CHILD CARE SUBSIDY SYSTEM: POLICIES AND PRACTICES THAT AFFECT ACCESS AND RETENTION (2002).

three-hour self-advocacy training that focuses on the specifics of the payment system, including the nuts and bolts of the paperwork requirements. Basic advocacy techniques, such as keeping copies of paperwork, taking notes of conversations (including date, name of person, and phone number), and developing and nurturing relationships with individual caseworkers are all part of the training. We have conducted this training for scores of providers and advocates on network staffs. We have also supplemented the training by convening meetings with social service agency staff where providers can air grievances and begin to develop working relationships with caseworkers. We are developing a provider advocacy guide that expands on the training materials and fact sheets that we already distribute.

### **B. Litigation to Correct Illegal Payment Policies and Practices**

Although litigation is not our tool of choice, we will sue to challenge policies or practices that are hurting more than one client. One such lawsuit is *Pabon v. Turner*.<sup>18</sup> Ms. Pabon came to us when her child care provider threatened to cut off child care because she was not receiving the proper rate of pay. When we investigated, we discovered a systemwide problem: the Human Resources Administration was routinely underpaying child care providers throughout the city because it was multiplying weekly child care rates by 4 to come up with a monthly total rather than by 4.33, the actual average number of weeks in a month.

Although the difference between the two figures may seem small, the resulting underpayment was costing child care providers hundreds of thousands of dollars each year in child care payments. For example, a provider who cares for a 2-year old full time is entitled to be paid \$127 per week. Under the challenged payment procedure, the provider would

receive \$508 ( $\$127 \times 4$ ) each month. Using the proper calculation ( $\$127 \times 4.33$ ), the provider would receive approximately \$550 each month, an increase of \$42 per month per child, or \$504 per year. These additional payments can mean the difference between survival and failure of a home-based child care business.

After advocacy failed, we sued to obtain retroactive child care payments for Ms. Pabon's child care provider and to force the Human Resources Administration to change its illegal underpayment practice. Shortly after we filed the case, the defendants agreed to pay the provider more than \$12,000 in retroactive payments. Since the underpayment practice was likely to be repeated, we refused to drop the case. The agency then adopted a policy directive that instructed welfare centers throughout the city how to calculate payments properly.<sup>19</sup> There are problems with the directive—most notably that it allows but does not require retroactive payments. Overall, however, resolution of this problem has put hundreds of thousands of dollars into the hands of child care providers across the city and made it more likely that those providers will be able to continue their business of caring for children.

### **C. Licensing Problems**

Home-based child care providers often encounter problems with regulatory agencies in obtaining or renewing their licenses. A simple abuse of agency power has caused some of these problems. The Office of Children and Family Services is the state agency charged with regulating family and group family child care.<sup>20</sup> The New York City Department of Health, under contract with the state agency, performs routine inspections of family day care homes, follows up on complaints about child care providers, distributes and collects applications, and performs other coordinating services for the licensing and registration process. Once the Department

<sup>18</sup> *Pabon v. Turner*, Index No. 403347/00 (N.Y. Sup. Ct. N.Y. County 2000) (Clearinghouse No. 54,894).

<sup>19</sup> N.Y. Family Independence Administrative Policy Directive No. 00-83, Generating Supplemental Child Care for Employed Individuals (Sept. 28, 2000).

<sup>20</sup> N.Y. SOC. SERV. LAW § 390.2(d) (Consol. 2002).



of Health collects the paperwork and performs an initial inspection, it is supposed to forward the provider's packet to the state agency for a final determination. A provider who receives an adverse determination has a right to a fair hearing before an impartial hearing officer.<sup>21</sup>

When we began the project, many providers told us that inspectors from the Department of Health had told them to close their businesses for failure to meet technical regulatory requirements. Many complied immediately, resulting in lost income for them and significant disruption for the children in their care. Research showed that the inspectors had no authority to order a family child care business to close absent an imminent threat to children's health and safety.<sup>22</sup> Unfortunately most providers and networks were unaware of the law: the practice for many years had been simply to comply with whatever the health inspector said. The provider would close and wait while her application for renewal slowly made its way to the state agency. Only after the state denied the license renewal—often months or even a year later—did the provider receive notice of her right to challenge the decision at a fair hearing.

We began working closely with the city health inspectors to make sure that they did not force anyone to close her business unless there was an emergency. We have also spent numerous hours training networks and their providers on these issues. The result is a substantial decrease in the number of such cases, and most network staff are aware of their providers' rights when dealing with the licensing agencies.

Licensing delays also cause serious problems. The requirements of the Quality Child Care and Protection Act, enacted in September 2000, have exacerbated delays caused by understaffing at the regulatory agency, miscommunica-

tions between city and state Agencies and the providers, and general bureaucratic incompetence.<sup>23</sup> The Act was intended to improve child care quality by requiring criminal background checks and additional training for day care providers, increased oversight, and increased penalties for out-of-compliance providers. However, in the nearly two years since this law took effect, the additional requirements have overwhelmed the regulatory agencies. As a result, the licensing process in New York has derailed, with disastrous consequences for some providers.

For example, some local social service offices refused to pay providers at all until they received a new license; others paid providers at lower, unlicensed rates. Similarly the state Department of Health, which administers the Child and Adult Care Food Program, made it extremely difficult for networks and their providers to be reimbursed for food expenses if the providers' licenses had expired.

A misunderstanding of the law caused all of these problems. Under the New York State Administrative Procedure Act, when a licensee has applied for the renewal of a license concerning an activity of a continuing nature, "the existing license does not expire until the application has been finally determined by the agency."<sup>24</sup> Thus any provider who has applied for renewal should be treated as fully licensed, no matter how long the renewal process takes. Despite our substantial efforts to inform agency staff about this requirement, providers continue to suffer illegally. As a result, we filed litigation to challenge resulting underpayments.<sup>25</sup>

Our client in the case, Ms. Mohamed, has been a licensed child care provider for more than ten years. In December 2000, as state law required, she applied to renew her license, which was due to expire in February 2001. Unfortunately for

<sup>21</sup> N.Y. COMP. CODES R. & R. tit. 18, §§ 416.18, 417.18 (2002).

<sup>22</sup> Id. § 416.18(a)(7).

<sup>23</sup> N.Y. SOC. SERV. LAW § 390 (Consol. 2002).

<sup>24</sup> N. Y. Admin. Procedure Act § 401.2 (Consol. 2002).

<sup>25</sup> *Mohamed v. Eggleston*, Index No. 401003/02 (N.Y. Sup. Ct. N.Y. County 2002) (Clearinghouse No. 54,895).

Ms. Mohamed, the state did not complete the renewal process until October 2001, nearly a year later. When Ms. Mohamed sought payment from the Human Resources Administration in April 2001 for the care of two children, her caseworker told her that, since her license had expired, she could no longer be paid at the licensed rate, even though the agency had already agreed, in writing, to pay her at the licensed rate. When Ms. Mohamed refused to accept a lesser amount, the caseworker refused to pay anything for more than three months of care provided to those children. Ms. Mohamed was forced to stop providing care for them since she could not get paid for her services.

After informal advocacy failed to produce any results, we sued both agencies to correct the Human Resources Administration's misunderstanding of the law, to obtain long overdue child care payments for Ms. Mohamed, and to compel the state licensing agency to maintain accurate computer records that would reflect the fact that a provider had applied for renewal. After we filed the case in March 2002, the Human Resources Administration immediately agreed to the back payments to Ms. Mohamed. We have settled the case; the agencies have agreed to modify their procedures to ensure that providers are given documentation that their licenses are in effect throughout the renewal process and that agency personnel understand the law and apply it correctly. The agencies have also agreed to maintain and make available a child care providers' list that accurately reflects the providers' license status and to install a phone line and assign a staff person to handle inquiries and problems from individuals and agencies concerning license status.

Both *Pabon* and *Mohamed* raise interesting and complex issues regarding standing to sue, the nature of the "right" to be

compensated for providing child care, and the lack of any kind of administrative or fair hearing remedy for unpaid child care providers. We plan to explore and develop these areas of the law as we continue to work on payment and licensing issues on behalf of child care providers.

#### **D. Housing Issues for Child Care Providers**

Many landlords force child care providers to cease operating their businesses by simply threatening an eviction proceeding. Many landlords charge providers substantial monthly fees in addition to their rent for the "privilege" of running a child care business in an apartment. Neither eviction threats nor extra charges are legal in rent-regulated or other leased apartments in New York State.<sup>26</sup> A major thrust of our housing-related work has been to educate child care providers about their legal protections so that they will not close down their businesses in response to a landlord's eviction threat.

We include housing issues in our "Legal Issues of Child Care" training that more than 400 family and group family day care providers have attended.<sup>27</sup> The child care networks organize the training sessions and perform them in their community offices. We have also widely distributed a fact sheet about providers' rights when renting apartments and have given advice to dozens of providers and networks. The project has prevented the commencement of numerous eviction proceedings simply by explaining the law to providers, landlords, and their lawyers. We have also successfully defended child care providers in court when a phone call does not deter an eviction proceeding. Fortunately for these providers, New York law makes it difficult for landlords to evict child care providers even when their residential leases forbid "commercial uses" in their apartment.

<sup>26</sup> Generally apartments are rent-regulated in New York if they are located in buildings with six or more apartments. Statutorily prescribed bases for "good cause" (e.g., breach of lease, nuisance) are required to commence an eviction proceeding. Statutes in other states also protect family child care providers. E.g., in California any lease or rental agreement provision that purports to restrict use of residential rental property for family child care in any way is void. CAL. HEALTH & SAFETY CODE § 1597.40(b) (2002).

<sup>27</sup> The training also focuses on insurance, incorporation, and public benefits issues.

New York courts hold that state laws promoting and regulating child care “pre-empt” zoning regulations and private contracts that purport to prohibit the provision of child care.<sup>28</sup> In *State of New York v. Town of Clarkston* the court holds that a challenged local zoning ordinance purporting to regulate home-based child care is preempted by the “comprehensive scheme of highly detailed family daycare regulations [ ] enacted to implement the law.”<sup>29</sup> That reasoning is extended to prohibit the eviction of child care providers who reside in condominiums and rent-regulated apartments.<sup>30</sup> Thus, when a child care provider can prove that she is licensed, “the legislature has basically preempted the area of home based child care by enacting legislation that permits what is prohibited in the lease ....”<sup>31</sup>

The courts also hold that the provision of child care in an apartment, when no harm was claimed to other tenants or the landlord, does not violate a substantial obligation of the tenancy even when a lease clause prohibits commercial use.<sup>32</sup> These cases rely on the decision of New York’s highest court in *Park East Land Corp. v. Finkelstein*.<sup>33</sup> There the court held

that a tenant who violated a lease provision related to occupancy standards was not allowed to be evicted where no harm to the landlord or other tenants was claimed. Rent regulation, the court held, permitted evictions only “to prevent extreme hardship and inequity to the landlord, inconvenience to other tenants or outright illegal action by the tenant ....”<sup>34</sup> Although a landlord could always sue to evict a tenant who caused a nuisance, an allegation that the tenant was violating the lease by running a child care business, without allegations of harm, failed to state a claim to evict.

Courts throughout the country approach these issues in a variety of ways.<sup>35</sup> For example, some states determine that home day care is a “residential use” not prohibited by covenants that exclude commercial businesses.<sup>36</sup> Others strictly construe covenants that prohibit the commercial use of residential premises and force child care providers to close their doors.<sup>37</sup>

## E. Insurance

Another major focus of our work is liability insurance. Damages actions against providers are rare but not unheard of. In

<sup>28</sup> See *Quinones v. Bd. of Managers of Regalwalk Condominium I*, 673 N.Y.S.2d 450 (2d Dep’t 1998); *People v. Town of Clarkston*, 559 N.Y.S.2d 736 (2d Dep’t 1990).

<sup>29</sup> *Town of Clarkston*, 559 N.Y.S.2d at 740, citing N.Y. COMP. CODES R. & R. tit. 18, § 417. See also *Barrett v. Dawson*, 71 Cal. Rptr.2d 899 (Cal. Ct. App. 1998) (law prohibiting restrictive covenants that limit family day care homes in residential neighborhoods is constitutional).

<sup>30</sup> *Quinones*, 673 N.Y.S.2d at 454 (“the [Condominium] Board may not enforce such [private] restriction against the plaintiffs”); 65 Ocean Ave. Assocs. v. Samuel, N.Y. LAW J., June 2, 2002, at 25 (Civ. Ct. Kings County).

<sup>31</sup> 65 *Ocean Avenue Assocs.*, N.Y. LAW J., at 25.

<sup>32</sup> *Sorkin v. Cross*, N.Y. LAW J., Apr. 24, 1996, at 25 (Civ. Ct. N.Y. County); *Young v. Alexander*, N.Y. LAW J., Sept. 7, 1994, at 27 (City Ct. New Rochelle, Westchester County); *Vittorio Properties Inc. v. Alprin*, 324 N.Y.S.2d 152 (Civ. Ct. Bronx County 1971) (Clearinghouse No. 6,507); *Diamant v. Isaacs*, 209 N.Y.S.2d 406 (Mun. Ct. Kings County 1960).

<sup>33</sup> *Park East Land Corp. v. Finkelstein*, 299 N.Y. 70 (1949).

<sup>34</sup> *Id.* at 76–77.

<sup>35</sup> A thorough survey of the law on these issues is beyond the scope of this article. For a national survey that discusses restrictive covenants and home based child care, see *Children’s Day Care Use as Violation of Restrictive Covenant*, 81 A.L.R.5th 345 (2002).

<sup>36</sup> See, e.g., *Terrien v. Zwit*, 238 Mich. App. 412, 605 N.W.2d 681 (1999); *Stewart v. Jackson*, 635 N.E.2d 186 (Ind. Ct. App. 1994).

<sup>37</sup> See, e.g., *Metzner v. Wojdyla*, 886 P.2d 154 (Wash. 1994); *Walton v. Carignan*, 407 S.E.2d 241 (N.C. 1991); *Woodvale Condominium Trust v. Scheff*, 540 N.E.2d 206 (Mass. 1989); *Chambers v. Gallaher*, 364 S.E.2d 576 (Ga. 1988); *Williams v. Tsiarkezos*, 272 A.2d 722 (Del. Ch. 1970); *Matthews v. Olson*, 212 So. 2d 357 (Fla. Dist. Ct. App. 2d Dist. 1968); *Berry v. Hemlepp*, 460 S.W.2d 352 (Ky. 1970).



the past two years four providers who had already been sued and many more who were likely to be sued have contacted our office. Unfortunately none had liability insurance; even worse, each owned her own home and was in serious danger of losing it.

While the cost of insurance is a barrier for some providers, many do not purchase insurance because they believe that they can limit their liability in other ways. For example, many networks helped their providers write contracts with parents that bar suits against the provider in case of an accident. Both providers and network staff have been surprised to learn that such contracts are not enforceable in court. Many other providers rely on their homeowners' insurance to cover them in case of an accident, but insurance company staff with whom we have spoken say that they will not cover liability related to a home-based child care business.<sup>38</sup>

We have received dozens of inquiries from providers who believe that incorporating will limit their liability; many have invested significant time and money to incorporate. In our experience, however, most family day care businesses are so intertwined with the providers' personal lives that incorporation would be unlikely to protect their personal assets. Child care takes place in the provider's home; children eat the provider's food, sleep on the provider's bed, and use the provider's furniture. Untangling the business and the personal sufficiently to allow a corporation to stand as a separate entity for liability purposes would be virtually impossible. The cost to the provider of attempting to separate her business from her personal life would be substantial. Purchasing liability insurance is a simpler, more effective solution.

## **F. Record Keeping and Tax Issues**

To our surprise, tax issues have also been a major focus of our work. Many fam-

ily day care providers pay thousands of dollars more in tax each year than they need to pay; they are also much more likely to be audited than an average taxpayer. Therefore it is in providers' interests to understand their tax responsibilities and the deductions to which they are entitled.

Family day care providers may deduct all of their business expenses when calculating their tax obligation. Because a family day care business is so intertwined with the provider's personal life and expenses, however, documenting business expenses can be difficult. In addition to deducting the portion of household food expenses, cleaning supplies, chairs, light bulbs, and the like that they spend on children in care, providers may deduct a portion of their rent and utilities. By calculating the "time-space percentage" (an estimate of what percentage of their home, both in terms of time and floor space, is regularly used for the business), providers may often deduct as much as 35 percent of their rent and utilities. A provider who pays \$800 per month in rent and utilities and takes this single deduction will save well over \$1,100 in taxes. By taking all the deductions to which they are entitled, many family day care providers can save between \$1,000 and \$2,000 each year. For a financially vulnerable small business, these savings can make a big difference.

Not surprisingly most child care providers with whom we speak are unaware of the deductions to which they are entitled. Most tax preparers do not know about these deductions either and do not claim them for their clients. This is so, in part, because different tax rules apply to child care providers. The most important distinction is that other small businesses, when using the time-space percentage to deduct household expenses including rent, may count only rooms exclusively used for business. Very few child care providers would qualify for a

<sup>38</sup> Although New York lacks an insurance law provision that specifically addresses family day care, other states may have such statutes. E.g., in California homeowners are protected by statute against "arbitrary cancellation" of their insurance "solely on the basis that the policyholder has a license to operate a family day care home." CAL. INS. CODE § 676.1 (2002).

deduction under these terms since care is usually provided in rooms that double as living space. However, child care providers need only use rooms regularly for business to count them in the time-space percentage. If a tax preparer is unaware of this distinction, the provider stands to lose from a few hundred dollars to over a thousand.

Family day care providers should also be concerned about their tax responsibilities because they are among the most likely groups in the country to be audited. Family day care providers should submit Form 8826 ("Business Use of Your Home") and Schedule C ("Profit or Loss from Business"), both of which trigger a disproportionate number of audits. Many providers qualify for the refundable earned income tax credit, another target of Internal Revenue Service audits. Providers who file these forms and request the earned income tax credit are twenty times more likely to be audited than an average taxpayer.<sup>39</sup> The Internal Revenue Service's taxpayer education and communication department has formed a "Child Care Provider Welfare to Work Taskforce," which will focus on increasing tax compliance by low-income child care providers.

To educate providers about these issues, we have developed a four-hour program that covers their basic tax responsibilities as well as deductions and record-keeping techniques. The training is not intended to encourage providers to file their own tax returns. Instead it allows them to prepare their records and make key calculations before they go to a tax preparer for assistance. If a provider has all the required figures and records, her tax preparer is much more likely to file the necessary forms and take the deductions to which she is entitled.

#### IV. Network Issues

Initially we expected our project to work primarily on the technical and transactional needs of the networks, and not for their providers. However, we quickly

found that the networks' problems were indistinguishable from those of their providers. For example, when providers cannot get their licenses, networks lose providers and are unable to serve enough children to meet the requirements of their Head Start or other government contracts. Providers turn first to network staff when they need help with legal or other problems. As a result, the networks expend enormous resources dealing with problems of individual providers. Giving the networks a place to direct their providers for help and information on specific issues is a significant service.

Helping providers with their problems was also a good way for us to learn quickly about the legal issues in the child care field. As we have gained expertise and credibility, networks seeking assistance in resolving their own organizational problems approach us far more regularly. We have worked with networks in two areas: providing technical and staff development assistance; and helping new networks incorporate, apply for federal tax exemption status, and plan their organizational development.

##### A. Technical Assistance and Staff Development

Network staff are often former child care providers or social workers with a background in child development. Some have been active in the field for so long that they are able to help their members on a wide variety of issues. However, issues facing child care providers have not been the focus of much legal advocacy, and most network staff do not have expertise in payment issues, housing law, licensing law, liability issues, and the legal implications of a variety of their providers' other problems. We have trained network staff on all these issues. We write bi-monthly issue papers that highlight recurring problems and their solutions and mail them to the city's 110 networks. We are developing a resource book for network staff and advocates on the legal issues in which we have been involved.

<sup>39</sup> David Cay Johnson, *Affluent Avoid Scrutiny on Taxes Even as IRS Warns of Cheating*, N.Y. TIMES, Apr. 7, 2002, at A1

## **B. Start-Up Networks**

We are helping five newly formed networks to incorporate, apply for federal tax-exemption, set up boards of directors, and apply for organizational grants. The organizations plan to train and support family day care providers under the new state Educational Incentive Program. The program makes available to providers up to \$2,000 in scholarships to pay for credit-bearing college courses, classes leading to a credential or certificate, or noncredit-bearing training and conferences related to child care or small business development. The scholarships are paid directly to the organization that conducts the training. Because the program pays networks to offer the training and support that they have provided free in the past, it is an extremely important source of support for child care networks, many of which have limited budgets. In addition to helping these new networks to

organize, we plan to seek pro bono assistance from New York City law firms for the networks' ongoing legal needs.

WITH ONE FULL-TIME PARALEGAL, SOME SUPERVISORY backup, and occasional support from a staff attorney, we have developed strong working relationships with several child care networks, their providers, and other child care advocates. By finding our "niche" in the child care advocacy community—one to which we bring a combination of legal analysis and advocacy skills as well as a commitment to supporting employment and community development opportunities—we have helped numerous child care providers and their networks improve their businesses and create some systemwide change along the way. We encourage other legal aid offices to join in this engaging and productive work.